No. 99-196

In The Supreme Court of the United States

ANR COAL COMPANY, INCORPORATED,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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REPLY TO BRIEF IN OPPOSITION

I. COGENTRIX'S DISCUSSION OF THE MERITS OF THE CASE DOES NOT ELIMINATE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION AND THIS COURT'S OPINIONS IN *MASTROBUONO*, *VOLT*, AND *COMMONWEALTH COATINGS* OR OPINIONS FROM OTHER CIRCUITS.

In the Brief in Opposition filed by Cogentrix of North Carolina, Inc. ("Cogentrix"), Cogentrix primarily discusses the merits of the case, rather than directly responding to the policy reasons outlined by ANR Coal Company, Inc. ("ANR") for granting the Petition for Writ of Certiorari (the "Petition"). By discussing the merits, Cogentrix does not eliminate the conflict between the Fourth Circuit's opinion and this Court's precedents or opinions from other circuits.

Cogentrix seeks to distinguish *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) and *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) by simply stating that those cases do not address the "evident partiality" ground under the Federal Arbitration Act (the "FAA"). Brief in Opposition at 11. Nonetheless, Cogentrix does not dispute in its Brief in Opposition that ANR sought vacatur of the arbitration award under multiple grounds under section 10 of the FAA, or that *Mastrobuono* implicitly recognizes that a violation of the right to have an arbitration agreement enforced according to its terms is properly remedied under the FAA by vacating the award entered in disregard of the parties' agreement. *See* Petition at 11. Nor does Cogentrix dispute that *Volt* holds that the obligation to enforce agreements to arbitrate extends specifically to the enforcement of agreed upon procedural rules. *See id.*

Cogentrix cannot reconcile the principles established in *Mastrobuono* and *Volt* with the holding in the Fourth Circuit's opinion that a violation of the parties' agreed procedural rules "would not, by itself, require or even permit a court to nullify an arbitration award." Appendix to the Petition ("A.") at 9. Rather, the Fourth Circuit held that the arbitration award could be set aside only on a further showing sufficient to support a finding of bias and improper motives. A. at 12; *see also* Brief in Opposition at 12.

Further, Cogentrix does not reconcile the Fourth Circuit's opinion with this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Cogentrix only focuses on the analysis in *Commonwealth Coatings* of what disclosures are required by an arbitrator when disclosure obligations are not otherwise defined. That analysis is irrelevant to this case because Brewer's disclosure obligations were defined by the AAA's rules and procedures and the AAA's express request for information in ruling on ANR's challenge for cause.

Cogentrix ignores the aspects of the *Commonwealth Coatings* holding that are in direct conflict with the opinion of the Fourth Circuit. The *Commonwealth Coatings* Court held that an arbitration award is appropriately vacated if an arbitrator violates a disclosure obligation, whether or not there is a sufficient showing to support a finding of bias or improper motives. *Id.* at 147, 149-50, 151-52. In fact, in *Commonwealth Coatings*, there was an express finding by the district court that the arbitrator was "entirely fair and impartial." *Id.* at 151 n."t." In direct contrast, the Fourth Circuit held that, notwithstanding a violation of a disclosure obligation, an arbitration award could only be vacated upon a further showing sufficient to support a finding of bias and improper motives. A. at 12.

Cogentrix's attempt to reconcile the Fourth Circuit's opinion with the decisions of other circuits likewise fails. Cogentrix merely borrows the Fourth Circuit's

characterization of the cited cases without dealing with what those courts actually did in those cases. According to Cogentrix, in the cited cases, the nondisclosures were so consequential that "evident partiality could be inferred." Brief in Opposition at 13. But under the Fourth Circuit's test, evident partiality can be inferred only if there is a sufficient showing to support a finding of bias and improper motives. A. at 12.

In *Schmitz v. Zilveti*, 20 F.3d 1043, 1048-49 (9th Cir. 1994), one of the cited cases, there was no evidence that the arbitrator knew the information he failed to disclose, and accordingly, there could not have been a showing sufficient to support a finding of bias or improper motives. Rather, the court found that the arbitrator failed to fulfill his obligations imposed pursuant to the parties' agreement to arbitrate, and that provided sufficient grounds to vacate the arbitration award. *Id.* In *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd*, 271 F.2d 266 (3rd Cir. 1959), the arbitrator made the required disclosures to the AAA, but the AAA failed to forward the information to the parties. There could have been no showing of improper motives, given that the arbitrator had made disclosure, but the court vacated the award based on the violation of the parties' agreed procedural rules. *Id.* at 302-03.

Given that the Fourth Circuit opinion is in conflict with this Court's precedents and opinions from other circuits on these critical issues dealing with the parties' right to insist on enforcement of their agreed procedural rules in arbitration, this Court should grant ANR's Petition for Writ of Certiorari.

II. ON THE MERITS, THE ARBITRATOR IN THIS CASE VIOLATED HIS DISCLOSURE OBLIGATIONS AND THE ARBITRATION AWARD WAS PROPERLY SET ASIDE BY THE DISTRICT COURT.

Although a discussion of the merits of this case seems more appropriately deferred until after a grant of the Petition, ANR will briefly address some of the issues raised in the Brief in Opposition.

Cogentrix's primary contention in its Brief in Opposition is that the Fourth Circuit appropriately applied the four-part test of *Consolidation Coal Co. v. Local 1643*, 48 F.3d 125, 130 (4th Cir. 1995), and correctly concluded that the undisclosed information was "trivial" and need not be disclosed. However, the purpose of the *Consolidation Coal* analysis is to determine the parameters of an otherwise undefined disclosure obligation. Accordingly, such an analysis was unnecessary in this case because the disclosure obligation had been defined by the AAA's express inquiry of Brewer to disclose the extent of his firm's representation of Carolina Power & Light ("CP&L"). In its opinion, the Fourth Circuit did not acknowledge the AAA's inquiry to Brewer.

The parties agreed that the AAA would rule on any challenges for cause. Cogentrix acknowledges in its Brief in Opposition that the AAA granted challenges for cause, two of which were based on prior relationships with CP&L. Brief in Opposition at 2 n.2. Further, Cogentrix does not dispute that Brewer was challenged for cause, and that, in response to that challenge, Brewer was asked to disclose the extent of his firm's representation of CP&L. Accordingly, Brewer had a disclosure obligation based on the AAA's express request, which the Fourth Circuit simply ignored in its opinion.

Cogentrix throws out a red herring in its Brief in Opposition when it suggests that a violation of Brewer's disclosure obligations would not have affected ANR's peremptory challenges because Rule 19 only requires disclosure after an arbitrator's selection. In this case, Brewer's primary disclosure violation was his failure to disclose information expressly requested by the AAA in ruling on ANR's challenge for cause, in addition to his violations of Rule 19. The AAA's express request for information occurred prior to ANR's exercise of its peremptory challenges and rankings. Brewer's incomplete disclosures were misleading, and thus Brewer's violation of that disclosure obligation adversely affected ANR's ability to exercise properly informed peremptory challenges and rankings. Even now, the full extent of Brewer's firm's representation of CP&L is unknown. A. at 26 n.4.

Although Cogentrix touts that the Fourth Circuit performed a thorough review of the record, and that its analysis is "surely correct," the district court performed the same thorough review of the same record. The district court concluded that the arbitration award should be vacated. A. at 27. Even after the Fourth Circuit rendered its opinion, the district court affirmed its belief that the Fourth Circuit wrongly decided this case on appeal. A. at 31.

Brewer violated his disclosure obligations which in turn affected the AAA's ability to rule on ANR's challenge for cause and ANR's ability to exercise its peremptory challenges and rankings. Pursuant to the authorities cited in the Petition, the appropriate remedy under the FAA was vacatur of the arbitration award without any further required showing to support a finding of bias or improper motives. This Court should grant the Petition to correct the Fourth Circuit opinion which holds to the contrary.

CONCLUSION

For the reasons outlined herein and previously submitted to the Court, ANR respectfully requests the Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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